Supreme Court of the United States

OCTOBER TERM, 1974

NOV 7 1974
MICHAEL RODAK, JR., CLERK

No. 74-90

OLIVER J. KELLER, Secretary, Department of Health and Rehabilitative Services, State of Florida,
Petitioner,

v.

CORDELIA DENISE MIXON, a Minor, by and through her next friend, EUNICE CARTER, and LAVERNE CRAWFORD, a/k/a LAVERNE WILLIAMS, individually and on behalf of all others similarly situated,
Respondents,

and

E. DOUGLAS ENDSLEY, Director, Division of Family Services, Department of Health and Rehabilitative Services, State of Florida, and RICHARD RUSSELL, Director, Region 2, Division of Family Services, Department of Health and Rehabilitative Services, State of Florida and the Department of Health and Rehabilitative Services, State of Florida,
Petitioners,

v.

LEILA F. POOLE, individually, and on behalf of others similarly situated,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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In The
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ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari

before Judgment, entered on October 15, 1974, and (2) granting the Petition. As grounds for this motion, Petitioner states the following:

THE GRANT OF CERTIORARI IN ALCALA v. BURNS, U.S. S.CT. NO. 73-1708

An intervening circumstance of substantial and controlling effect occurred after the denial by this Court of the Petition for a Writ of Certiorari Before Judgment filed by the State of Florida; to-wit: On October 15, 1974, this Court granted Certiorari in *Alcala* v. *Burns*.[1]

The legal question which *both* the State of Iowa and the State of Florida seek to have resolved by this Court is: Does Title IV of the Social Security Act (42 U.S.C. § 601, *et seq.*), require, or even allow, fetal participation in the Aid to Families with Dependent Children program? Despite the fact that the identical question is raised, the Petition for Certiorari filed by the State of Florida was denied and the Petition for Certiorari filed by the State of Iowa was granted. Since this Court handed down both Orders on the same day, the dissimilar action taken by this Court, on what should be companion cases, may not have come to the attention of this Court. This Court has granted Rehearings in the past when the same or related issues have come before this Court in another case still pending.

The State of Florida sought Certiorari under Rule 20 of

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1 *Alcala* v. *Burns*, 362 F. Supp. 180 (S.D. Iowa 1973), *stay granted* 414 U.S. 809, 38 L. Ed. 2d 45, 94 S. Ct. 26 (1973), *aff'd* 494 F. 2d 743 (8th Cir. 1974); *petition for cert. granted*, 43 U.S.L.W. 3208, U.S. S. Ct. No. 73-1708 (Oct. 15, 1974).

the Supreme Court of the United States Revised Rules, which allows the grant of a Writ of Certiorari to review a case pending in a Circuit Court of Appeals prior to Judgment of said Court of Appeals. It is submitted that Rule 20 was adopted by this Court for just such an extraordinary situation as the one at bar. Not only does this case involve issues of such importance as to justify deviation from normal appellate processes, but this case could join and be consolidated with the *Alcala* case now before this Court which presents the identical question of law. This Court in the past has traditionally reviewed cases before Judgment below when a similar or identical question of constitutional or other importance was already before the Court in another case.[2]

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2 *White* v. *Mechanics Securities Corp.*, 269 U.S. 283, 299, 70 L. Ed. 275, (1925), (cases involving bills in equity brought under the Trading with the Enemy Act); *Johnson* v. *United States Shipping Board*, 280 U.S. 320, 324-325, 75 L. Ed. 451 (1929), (cases involving question of whether the Suits in Admiralty Act provided exclusive remedy); *Graham and Foster* v. *Goodcell*, 282 U.S. 409, 411-412, 415 n. 2, 75 L. Ed. 415 (1930), (cases involving effect and validity of §611 in connection with §607 of the Revenue Act of 1928); *Reid* v. *Covert*, 354 U.S. 1, 5, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957), (cases involving power of Congress to expose civilians to trial by military tribunals); *Taylor* v. *McElroy*, 360 U.S. 709, 3 L. Ed. 2d 1528, 79 S. Ct. 1428 (1959), (cases involving validity of government's revocation of security clearance without confrontation and cross-examination of witness against individuals); *United States* v. *Thomas*, 361 U.S. 950, 4 L. Ed. 2d 383, 80 S. Ct. 398 (1960), (cases involving question under Civil Rights Act of 1957); *Hannah* v. *Larche*, 363 U.S. 420, 4 L. Ed. 2d 1307, 80 S. Ct. 1502 (1960), (cases involving validity of procedural rules of Federal Commission on Civil Rights); *McElroy* v. *Guagliardo*, 361 U.S. 281, 283,

However, there are substantial and unique differences in the Florida and the Iowa cases which merit this Court's attention and consideration being given to *both* cases. (1) The State of Florida, unlike the State of Iowa, would come before this Court with the presumption of correctness, having been the successful litigant in two United States District Courts.[3] (2) The legal argument advanced by the State of Florida is unique in that it directly challenges the authority of the Department of Health, Education and Welfare to promulgate regulations wholly outside the clear meaning and intent of the enabling Statutes. This position is buttressed by the plain language of the Social Security Act, the legislative history, and United States Supreme Court decisions. The United States District Courts in the Northern District of Florida and the Middle District of Florida, both held that the Social Security Act did not make provision for fetal participation in the Aid to Families with Dependent Children program and that the implementing regulations promulgated

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4 L. Ed. 2d 282, 80 S. Ct. 305 (1960), (cases involving application of Article 2(11) of the Uniform Code of Military Justice); *McCullough* v. *Sociedad Nacional*, 372 U.S. 10, 12, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963) (cases involving coverage of the National Labor Relations Act, as amended, 61 Stat 136, 73 Stat 541, 29 U.S.C. §§151, *et seq.*).

3 *Mixon* v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), *appeal docketed*, No. 74-2119, 5th Cir., April 30, 1974, *cert. denied*, 43 U.S.L.W. 3213, U.S. S. Ct. No. 74-90 (Oct. 15, 1974); *Poole* v. *Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), *appeal docketed*, No. 74-1997, 5th Cir., April 17, 1974, *cert. denied*, 43 U.S.L.W. 3213, U.S. S. Ct. No. 74-90 (Oct. 15, 1974); *Geissler* v. *Endsley*, No. 74-3 (N.D. Fla., filed March 4, 1974).

by the Department of Health, Education and Welfare, which allow fetal benefits at the option of the State, are illegal.[4]

In *Alcala*, the Eighth Circuit reasoned from the HEW regulations back to the Social Security Act, instead of from the Social Security Act forward to the HEW regulations. Therefore, by granting Certiorari to Florida, this Court will have the benefit of Florida's argument of legal theories substantially different in kind and degree from theories advanced by other states. And, the citizens of the State of Florida will have the opportunity of presenting their case in Court prior to this Court handing down a decision which will be of far reaching consequence involving hundreds of individuals personally as well as millions of dollars, and the State's administrative system.

CONFLICT IN CIRCUITS

A conflict in the circuit courts of appeals has arisen since Florida submitted the Petition for a Writ of Certiorari before Judgment. On October 11, 1974, the United States Court of Appeals for the Second Circuit ruled that Title IV of the Social Security Act does *not* permit or authorize fetal coverage in the Aid to Dependent Children program. *Wisdom* v. *Norton*, 372 F. Supp. 1190 (D. Conn. 1974), *rev'd*, No. 1058, Sept. Term 1973 (2nd Cir., filed October 11, 1974).

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4 *Mixon* v. *Keller, supra; Poole* v. *Endsley, supra; Geissler* v. *Endsley, supra.*

CONCLUSION

The State of Iowa has been requested by this Court to follow an expedited schedule in submitting its Brief on the merits with same being delivered to this Court by the 19th of November, 1974. With this schedule in mind, the State of Florida respectfully requests action on this Petition for Rehearing as soon as possible.

For the reasons set forth above, as well as those contained in the Petition for a Writ of Certiorari before Judgment, Petitioner prays that this Court grant Rehearing of the Order of Denial, vacate that Order, and grant the Petition for a Writ of Certiorari before Judgment.

Respectfully submitted,

OLIVER J. KELLER,
E. DOUGLAS ENDSLEY and
RICHARD RUSSELL, Division
of Family Services, Department
of Health and Rehabilitative
Services, State of Florida

By Counsel:

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CERTIFICATE OF COUNSEL

As Counsel for the Petitioners, I hereby certify that this PETITION FOR REHEARING is presented in good faith and not for delay and is restricted to the grounds set forth as appropriate for the grant of Rehearings under Rule 58 (2) of the Supreme Court of the United States Revised Rules.

EVA DUNKERLEY PECK
Counsel of Record

CERTIFICATE OF SERVICE

I, EVA DUNKERLEY PECK, a Member of the Bar of the Supreme Court of the United States and Counsel for the Petitioners, Oliver J. Keller, E. Douglas Endsley, and Richard Russell, hereby certify that I have served three copies of the foregoing PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT by depositing the same in the United States Post Office, first class postage prepaid, this 6th day of November, A. D. 1974, to PAUL C. DOYLE, Esquire, Duval County Legal Aid Association, 816 Florida Avenue, Jacksonville, Florida 32206, Counsel for Respondents Cordelia Denise Mixon and Laverne Crawford, a/k/a Laverne Williams, and to LAWRENCE Z. SHIEKMAN, Esquire, College of Law, Florida State University, Tallahassee, Florida 32306, Counsel for Respondent Leila F. Poole. All parties required to be served have been served.

EVA DUNKERLEY PECK